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IN THE

Supreme Court of the United States.

OCTOBER TERM—1929.

No. 452

RICHBOURG MOTOR COMPANY,
Petitioner

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JOSEPH G. MYERSON,
Counsel for the Petitioner.

CHARLES G. LEE, JR.,
R. R. WILLIAMS,
Of Counsel.

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PETITION

Your petitioner, Richbourg Motor Company, by Joseph G. Myerson, its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on July 22, 1928, affirming the decision of the United States District Court for the Western District of North Carolina (at Asheville).

QUESTION PRESENTED

May proceedings in forfeiture under R. S. 3450 (26 U. S. C. A., 1181) be maintained against an automobile

seized by a Prohibition Officer while being used to transport intoxicating liquor under circumstances which indicate a violation of Section 26 of the National Prohibition Act?

Both the District Court for the Western District of North Carolina and the Circuit Court of Appeals for the Fourth Circuit answered this question in the affirmative. That answer the petitioner contends is erroneous.

Statutes Involved

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act. Oct. 28, 1919; 41 St. L. 305, 315; 27 U. S. C. A., Sec. 40.

> Sec. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on

the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the same, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in any other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

R. S., Sec. 3450, 26 U. S. C. A., Sec. 1181:

SEC. 3450. REMOVING AND CONCEALING ARTICLES WITH INTENT TO DEFRAUD UNITED STATES OF TAX—FORFEITURE AND PENALTY. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public

auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spiritous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

Statement

The facts are succinctly stated in the *per curiam* opinion of the Circuit Court (R. 18) as follows:

> "On February 22nd, 1927, the automobile in question was being operated by a Mrs. Bryson, who with two companions, was driving therein. A prohibition enforcement officer stopped them and, upon searching the car, found more than twelve gallons of whiskey. He thereupon took the car into his possession and arrested the occupants, who were bound over to court by a United States Commissioner on a charge of violating the National Prohibition Act. The United States attorney, however, did not proceed under the National Prohibition Act, but sent a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the car itself under Section 3450. An intervening petition claiming the car was filed by the Richbourg Motor Company, the innocent holder of an unsatisfied purchase money lien thereon, but the District Judge ordered it forfeited and the motor company has appealed."

From the record (R. 7) it appears that on or about February 22, 1927, W. W. Owens, a Federal Prohibition

Officer, seized Ford coupe No. 14444150, from Ruth Bryson, H. C. Collins and Jessie Neal under the following circumstances: *The officer saw the automobile proceeding on the road and was suspicious of the car because he knew Mrs. Bryson, one of the occupants. He watched for the car and as it came back stopped it on the main highway.* Finding liquor in the car upon investigation, he seized the automobile and arrested the three persons in the machine, taking them before the United States Commissioner, where they were charged with transporting whiskey in violation of the Prohibition Act (R. 7).

The United States Attorney thereafter obtained a bill of indictment against the occupants of the car under Section 3296 of the Revised Statutes and filed a libel against the automobile under Section 3450 (R. 7). An intervening petition was filed by Richbourg Motor Company, which had sold the machine to Mary Hunnicutt, under a conditional sales contract, after an investigation which disclosed to Richbourg Motor Company that Mrs. Hunnicutt was a reliable and law abiding woman, and that there was no information or suspicion that she was engaged in the violation of any law or had ever engaged in the traffic of intoxicating liquor (R. 7-8). The unpaid balance under the conditional sales contract at the time of the seizure was $417.00 (R. 8).

Specification of Errors to be Urged

The Circuit Court of Appeals erred in holding that the automobile which was being used to transport intoxicating liquor in violation of the National Prohibition Act could be forfeited pursuant to Section 3450 of the Revised Statutes.

Reasons for Granting the Writ

1. The question involved is one of great public importance and vitally affects the Government in its administration of the National Prohibition Act. United States Attorneys in the various districts are not agreed upon an interpretation of the law and consequently the procedure in the various districts is neither uniform nor consistent.

2. The issue is important to industry since annually automobiles of the estimated value of two million dollars are confiscated for illicit traffic in intoxicating liquors. Because of the present confusion in the construction of the law, automobile companies and finance companies are uncertain as to their rights. This condition induces excessive litigation, delay and expense to the companies interested as well as to the United States Government.

3. A final determination by this Court will clarify the law since the various Circuit Courts and District Courts have reached diverse conclusions on this issue. The Circuit Court decision in this case is at variance with the holding of the Circuit Court of Appeals for the Fifth Circuit in the case of *United States* v. *General Motors Acceptance Corporation*, 25 F. (2nd) 238.

4. The case presents clearly for the consideration of this Court an issue which was left undecided by the important cases of *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321; *Port Gardner Investment Co.* v *United States*, 272 U. S. 564; and *Commercial Credit Co.* v. *United States*, 276 U. S. 226.

5. Many cases in which this question is at issue are pending in the Federal Courts.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

RICHBOURG MOTOR COMPANY,
By JOSEPH G. MYERSON,
Counsel for the Petitioner.

CHARLES G. LEE, JR.,
R. R. WILLIAMS,
Of Counsel.

October, 1929.

BRIEF IN SUPPORT OF PETITION

Opinions Below

No opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court (R. 18) is reported in 34 F. (2nd) 38.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered on July 22, 1928 (R. 20). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement

A statement of the facts and of the errors relied on will be found in the petition.

Argument

I

FORFEITURE PROCEEDINGS OF AUTOMOBILES USED IN THE TRANSPORTATION OF INTOXICATING LIQUORS MUST BE INSTITUTED UNDER SECTION 26 OF THE NATIONAL PROHIBITION ACT AND MAY NOT BE MAINTAINED UNDER SECTION 3450 OF THE REVISED STATUTES.

Section 26 is mandatory in its requirement that when a vehicle is found under circumstances indicating unlaw-

ful transportation, proceedings in forfeiture must be brought under that section. As to unlawful transportation therefore, Section 26 is clearly inconsistent with and to that extent has repealed Section 3450. This view has been expressed directly or by concurrence by four of the Justices of this Court.

It is true that this Court has held that Section 26 of the National Prohibition Act did not entirely repeal Section 3450 of the Revised Statutes and that the latter section may in a proper case be invoked (*United States* v. *One Ford Coupe Automobile*, 272 U. S. 321). In that case, however, the question of whether Section 26 repealed Section 3450 as to unlawful transportation as distinguished from unlawful possession not incident to transportation, was not considered.

That question has been touched upon but not decided in three cases heretofore before this Court and the argument herein contained shall proceed solely upon the language of this Court in the three cases. These are in the order of their consideration by this Court: *United States* v. *One Ford Coupe Automobile*, 272 U. S. 321; *Port Gardner Investment Co.* v. *United States*, 272 U. S. 564; *Commercial Credit Co.* v. *United States*, 276 U. S. 226.

In the *Ford Coupe* case the Court, referring to the issue here involved, stated at page 333:

> "The claimant contends that, as applied to intoxicating liquors, §3540 and §26 are alternative remedies; and may not be employed cumulatively. Section 26 commands that when a person is discovered in the act of transporting, by means of a vehicle, intoxicating liquors in violation of the law, the officer shall take possession of the vehicle

and shall arrest the person in charge thereof; that the person shall be proceeded against for the violation; that, pending the proceeding against him, the vehicle shall be surrendered to the owner upon giving bond to return it to the custody of the officer on the day of the trial to abide the judgment of the court; that, in case of conviction of the person, the vehicle shall be sold under conditions and in a manner prescribed; that the proceeds remaining after paying the expenses shall be paid over to lienors innocent of wrong doing; and that, unless and except so far as there are such lienors or others entitled thereto, the net proceeds shall be paid into the Treasury of the United States. The claimant insists not only that the government must elect between §26 and §3450, but that the commencement of proceedings under §26 bars a resort to §3450.

The case at the bar does not present any conceivable question of cumulative remedies or of election. While the second sentence in §26 uses the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used."

Accordingly, the Court did not pass upon the issue. However, Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case, observed:

"I agree also that there conceivably may be a deposit or concealment of illicit liquor in an auto-

> mobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of §26 and to that extent the two sections are not in conflict. *But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law with intent to defraud the United States of the tax. In that case, §26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section."* (Italics ours.)

In the dissenting opinion in the *Ford Coupe* case Mr. Justice Butler did not follow the majority of the Court in failing to consider the issue which was incidentally presented in the *Ford Coupe* case, and which is here squarely presented, stating at page 344:

> "The opinion proceeds on the theory that transportation of whiskey in the automobile is not shown outside the claim of the Garth Motor Company. And it is held that, the dismissal being set aside, hearing on the question whether Killian was transporting the whiskey may be had in the lower court. It seems to me the litigation need not be so delayed, and that the important question pressing for decision should be decided now",

and considering this important question, deemed in 1926 to be pressing and remaining in 1929 still undecided, Mr. Justice Butler goes on to state:

> "When the information was filed, the court issued a writ of attachment, commanding the mar-

shal to attach the automobile 'which is now being held by Edgar N. Read, acting prohibition director', to detain it until the further order of the court and to give notice to the claimant. The marshal made his return that he had executed the writ by handing a copy to Acting Director Read and by seizing the automobile. December 6, 1923, the claimant filed a motion to quash the libel. April 14, 1924, it filed its claim, alleging that the title to the automobile which was seized while being used by Killian 'in and about the unlawful transportation of intoxicating liquors' was in the company, subject to a conditional sales contract, and gave the bond provided for in §26, which was approved by the District Judge. The motion to quash was sustained and the libel was dismissed. The District Judge filed no opinion. The Circuit Court of Appeals affirmed the judgment. 4 F. (2nd) 528. In its opinion that court said: 'The position now taken by the government in this case is that the interest of an innocent owner or lien holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder of a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by someone who had the intent to defraud the government of its internal revenue tax'. And the court held that §3450 is superseded by §26 in so far as there is conflict between them. It dealt with the case as one involving a violation of §26.

I think the court's interpretation of the record was right. The prohibition agent discovered Kil-

lian in possession of an automobile containing 27 quarts of illicit whiskey in violation of the National Prohibition Act. The agent seized the vehicle; and, as it was his duty to do so, it must be found that he also seized the whiskey. The prosecution of Killian was commenced by filing complaint charging him with the crime of *illegal possession* in violation of that act. The facts stated make out 'transportation'. * * * I am of the opinion that the decree should be affirmed. * * *

Section 26 directs the proceedings to be taken in respect of the vehicle 'whenever intoxicating liquors transported or possessed illegally shall be seized by an officer'. The libel brings the case within the words and meaning of the clause just quoted."

The dissenting opinion of Mr. Justice Butler received the concurrence of Mr. Justice McReynolds and Mr. Justice Sutherland.

In the *Port Gardner Company* case six questions were presented by the Certificate. The fifth question was: "Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of the Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?"

The opinion of the Court delivered by Mr. Justice Brandeis considering the fifth question stated at page 566:

"The disposition of the automobile prescribed in §26 became mandatory after Neadeau's conviction; and being inconsistent with the disposi-

tion under §3450 necessarily precluded resort to proceedings under the latter section. Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.

We need not determine whether the mere commencement of a proceeding under §26 constitutes an election. Nor need we give specific answers to the other questions asked, since the certificate does not disclose any reason why the sale of the automobile, subject to the interests of innocent parties, should not have been ordered by the District Court after the conviction of Neadeau."

So that as in the *Ford Coupe* case, the question we are interested in remained undecided.

In a concurring opinion, however, Mr. Justice Butler again, as in the *Ford Coupe* case, regretted the fact that the decision of the Court was qualified and restricted. The concurring opinion is short and follows in full:

"I agree that the answer to question 5 should be in the affirmative.

In the opinion it is said, 'Construing the fifth question as referring to the prosecution with effect, we answer the question in the affirmative.' This means prosecution and conviction of the driver constitute an election to proceed against the vehicle under §26 and prevent forfeiture under §3450. The answer is enough to guide the Circuit Court of Appeals in this case. But it leaves open the question which is not decided in No. 115. *The substance of that question is whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle*

as there directed. I think he has no more right to ignore the command than he has to let the liquor and offender go. The law makes the election. (Italics ours.) I regret that this Court's answer is so qualified and restricted. Section 26 is not so restrained.

I am authorized to say that Mr. Justice Stone concurs in this opinion."

The final case considered by this Court, in which the issue here involved was raised but not decided, was that of *Commercial Credit Company* v. *United States*, 276 U. S. 226. In that case proceedings to forfeit an automobile under Section 3450 were brought after one Campbell, in charge of the automobile, having been prosecuted in the District Court under the National Prohibition Act on charges of unlawful possession and transportation of liquor, had pleaded guilty to unlawful possession, whereupon the Government had dismissed the charge of unlawful transportation.

The Circuit Court of Appeals, on the theory that Campbell's conviction of unlawfully possessing liquor was under Section 3 of Title II of the Prohibition Act, and therefore did not entail a disposition of the car under Section 26 of that title, held that the Government was at liberty to proceed under Section 3450 for the forfeiture of the automobile.

This Court reversed the decision of the Circuit Court of Appeals because the facts indicated that the possession, as to which he had pleaded guilty, was possession in transportation and that therefore under the doctrine of the *Port Gardner Investment Company* case the disposition of the car under Section 26 became mandatory after the conviction.

However, the Court in this *Commercial Credit* case, as in the *Port Gardner* case and in the *Ford Coupe* case, did not avail itself of the opportunity to answer the question propounded by Mr. Justice Butler in his concurring opinion in the *Port Gardner* case, declaring at page 231:

> "The claimant states that the question here presented is that which was referred to in a concurring opinion in the *Port Gardner Investment Company* case, namely, 'whether the prohibition officer discovering one in the act of transportation may disregard the plain and direct commands of §26 to proceed against the vehicle as there directed', and on that assumption the arguments have been largely directed to the question whether, whenever an officer discovers a person in the act of transporting intoxicating liquor in a vehicle, the provisions of §26 become mandatory in such sense as to furnish the exclusive remedy for the forfeiture of the vehicle. But, since it appears that the officer in fact seized the vehicle and arrested Campbell, who was in fact proceeded against under the Prohibition Act, the question of the officer's duty to proceed under §26 is not here involved."

II

PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THE ISSUE PRESENTED MAY BE FINALLY DETERMINED.

The petition herein points out that the Circuit Court decision in this case is at variance with the holding of the Circuit Court of Appeals for the Fifth Circuit in the

case of *United States* v. *General Motors Acceptance Corporation*, 25 F. (2nd) 238.

Not only is it true that the Circuit Courts of Appeals decisions referred to are at variance, but District Courts throughout the country continue, in circuits where the Circuit Court of Appeals has not had the question presented, to reach different conclusions. This has led to an unfortunate situation in that an innocent lienor whose automobile is seized in one part of the country may and does have greater rights than one whose automobile is seized in another part of the country. The United States Attorneys because of this confusion, in some parts of the country employ R. S. 3450 in practically all of their seizure cases, whereas in other parts of the country United States Attorneys seldom have recourse to that statute, but employ the National Prohibition Act, under which the lienor's interest is considered by the Court.

This is an unsound condition and cannot be corrected until the issue here presented is directly passed upon by this Court.

CONCLUSION

It is respectfully submitted that the issue in this case will flatly present to the Court that same question as to which Mr. Justice Butler, Mr. Justice Stone, Mr. Justice McReynolds and Mr. Justice Sutherland have expressed themselves as being in accord with the position taken by the petitioner, and as to which the majority of the Court has not found occasion directly to pass upon the point.

It is respectfully urged that the Court grant the relief prayed for by the petition in this case to the end that the law on the question at issue may be settled for the guid-

ance of Federal District and Circuit Courts, the Federal Prohibition Administrative agencies and of the automobile industry, relief under present conditions being largely a matter of geographical caprice.

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October, 1929.